

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
BOBBY LEE SEHORN,
Defendant.

Case No.: 95cr72 WQH

ORDER

HAYES, Judge,

The matter before the Court is the motion for modification of sentence under 18 U.S.C. § 3582(c)(1) filed by Defendant. (ECF No. 707).¹

Background

The charges against the Petitioner and his co-defendants resulted from an armed jewelry store robbery in San Diego, California on July 1, 1992. On April 12, 1996, a jury found Petitioner guilty of Count 1, interference with commerce by robbery (Hobbs Act robbery), in violation of 18 U.S.C. § 1951(a); and Count 2, aiding and abetting the using and carrying of a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) and 18 U.S.C. § 2.

¹ Defendant filed a motion for leave to supplement (ECF No. 718). This motion is granted and the Court has considered the supplement.

1 The Presentence Investigation Report calculated the guideline range Under the
2 United States Sentencing Guidelines to be 151-188 months for Count 1. The report stated
3 that Petitioner was subject to a mandatory consecutive term of imprisonment of twenty
4 years on Count 2 under 18 U.S.C. § 924(c)(1) for a second or subsequent conviction under
5 this section. The Presentence Report included in the criminal history the sentence
6 Defendant was currently serving in No. 94-cr-362 (C.D. Cal.) for a Los Angeles bank
7 robbery that occurred on April 20, 1994. On September 6, 1994, Defendant was sentenced
8 in the Los Angeles bank robbery case to 70 months on Count 1 Conspiracy to Commit
9 Armed Bank Robbery in violation of 18 U.S.C. § 2113(a) and (b); and 60 months on Count
10 3 using a firearm during a crime of violence in violation of 18 U.S.C. § 924(c) to be served
11 consecutively with Count 1.

12 On August 30, 1996, the Court held a sentencing hearing in this case. The Court
13 found sufficient evidence to support the conviction under § 924(c) stating that the 20 year
14 consecutive sentence was applicable because the Defendant had a previous § 924(c)
15 conviction in the Los Angeles robbery case No. 94-cr-362. Defendant objected to the 240
16 months consecutive sentence on Count 2 on the grounds that the Los Angeles bank robbery
17 occurred on April 20, 1994 after the July 1992 robbery in this case. The Court concluded
18 that the sentence imposed in this case was a second and subsequent sentence to the Los
19 Angeles robbery case and subject to the 240 months consecutive mandatory pursuant to §
20 924(c)(1). The Court concluded that the mandatory consecutive sentence of 240 months
21 on Count 2 was statutorily mandated by 18 U.S.C. § 924(c)(1) because “there has been a
22 previous conviction of a 924(c).” ECF No. 723-1 at 47.

23 The Court entered a Judgment sentencing Petitioner to a term of 161 months as to
24 Counts 1, concurrent with Central District of Los Angeles Case No. 94-0362; and 240
25 months as to Count 2, consecutive to Count 1 and Central District of Los Angeles Case
26 No. 94-0362. (ECF No. 462).

27 Petitioner filed a timely appeal of his conviction in this case on a number of grounds
28 and the Court of Appeals affirmed Petitioner’s conviction. *United States v. Sehorn*, 137

1 F.3d 1094, 1104 (9th Cir. 1998). On appeal, Defendant challenged the application of the
2 20-year mandatory sentence on Count 2. The Court of Appeals affirmed the sentence
3 stating:

4 The district court sentenced Sehorn to a 20–year mandatory sentence on Count
5 Two, which charged aiding and abetting a firearms crime under 18 U.S.C. §
6 924(c). This statute provides that “[i]n the case of his second or subsequent
7 conviction under this subsection, such person shall be sentenced to
8 imprisonment for twenty years ...” Because Sehorn was previously convicted
under this statute for a Los Angeles robbery, the district court sentenced
Sehorn to the mandatory twenty-year sentence.

9 Sehorn argues that the mandatory twenty-year sentence was not warranted
10 because the Los Angeles robbery occurred after the July 1992 robbery for
11 which appellant was convicted in this case. However, the language of § 924(c)
12 plainly refers to a subsequent conviction, not a subsequent crime. As this court
13 has pointed out: “There is nothing in the simple wording of this statute that
14 requires that an offense underlying a second conviction occur after the
15 conviction for the first offense. The only requirement is that a conviction be
16 second or subsequent, not that any offense underlying that conviction follow
17 a first conviction.” *United States v. Neal*, 976 F.2d 601, 602 (9th Cir.1992).
18 *See also Deal v. United States*, 508 U.S. 129, 134, 113 S.Ct. 1993, 1997–98,
124 L.Ed.2d 44 (1993) (noting that the term “second or subsequent
19 conviction” means that “a defendant convicted of a crime committed in 1992,
who has previously been convicted of a crime committed in 1993, would
receive the enhanced sentence”). Thus, the twenty-year mandatory sentence
was proper.

20 *Id.* at 1111.

21 Petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C.
22 § 2255 which was denied by the district court. (ECF No. 626). On September 20, 2016, the
23 Court of Appeals granted the application to file a second or successive 28 U.S.C. § 2255
24 motion and transferred Petitioner’s motion to vacate, set aside, or correct his sentence under
25 28 U.S.C. § 2255 to this district court. (ECF No. 676). On February 17, 2017, this Court
26 denied Petitioner’s motion to vacate, set aside, or correct his sentence under 28 U.S.C. §
27 2255. (ECF No. 695).

On December 17, 2019, Defendant filed a motion for modification of an imposed term of imprisonment pursuant to 18 U.S.C. § 3582(c)(1)(A)(i).² Defendant request that the Court reduce his sentence under the First Step Act for extraordinary and compelling reasons. Defendant asserts that the 401 month sentence was pursuant to the “mandatory stacking provisions of 18 U.S.C. §924(c) which no longer exist.” ECF No. 707 at 2. Defendant asserts that the amendments to § 924(c) made in the First Step Act no longer require the 240 months consecutive sentence on Count 2 in his case. Defendant further asserts that the sentencing judge imposed the lengthy sentence because he exercised his right to a jury trial. In addition, Defendant contends that he has compiled a remarkable record of rehabilitation showing that he is not a danger to the public, if released.

Plaintiff United States asserts that Defendant has not met the burden of showing that extraordinary and compelling reasons warrant a reduction in his sentence. Plaintiff United States asserts that it is not clear that the First Step revisions in §924(c) would affect Defendant’s sentence because Defendant had a final conviction in 94cr362 under §924(c) before he was sentenced in this case. Plaintiff United States further asserts that the record in this case does not support a finding that the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g). Plaintiff United States asserts that the Defendant was the leader and organizer of a large robbery crew, that took over a jewelry store at gunpoint. Plaintiff United States asserts that the nature and circumstances of this offense were aggravated, and the history and characteristics of the Defendant weigh against release.

Legal Standard

The First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, allows defendants, for the first time, to petition district courts directly for compassionate release. 18 U.S.C. § 3582(c)(1)(A) provides in relevant part:

The court may not modify a term of imprisonment once it has been imposed

² Defendant states that his current release date is April 16, 2025.

1 except that--

2 (1) in any case--

3 (A) the court, upon motion of the Director of the Bureau of Prisons, or upon
4 motion of the defendant after the defendant has fully exhausted all
5 administrative rights to appeal a failure of the Bureau of Prisons to bring a
6 motion on the defendant's behalf or the lapse of 30 days from the receipt of
7 such a request by the warden of the defendant's facility, whichever is earlier,
8 may reduce the term of imprisonment (and may impose a term of probation
9 or supervised release with or without conditions that does not exceed the
10 unserved portion of the original term of imprisonment), after considering the
11 factors set forth in section 3553(a) to the extent that they are applicable, if it
12 finds that--

13 (i) extraordinary and compelling reasons warrant such a reduction; . . .

14 and that such a reduction is consistent with applicable policy statements issued
15 by the Sentencing Commission;

16 18 U.S.C. § 3582(c)(1)(A). Section 1B1.13 of the Sentencing Guidelines, adopted
17 before the First Step Act, addresses motions for sentence reductions by the Director of
18 the Board of Prisons under 18 U.S.C. § 3582(c)(1)(A) stating:

19 Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. §
20 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose
21 a term of supervised release with or without conditions that does not exceed
22 the unserved portion of the original term of imprisonment) if, after
23 consideration of the factors set forth in 18 U.S.C. § 3553(a), to the extent that
24 they are applicable, the court determines that—

25 (1)(A) Extraordinary and compelling reasons warrant the reduction. . .

26 . . (2) The defendant is not a danger to the safety of any other person or to the
27 community, as provided in 18 U.S.C. § 3142(g); and

28 (3) The reduction is consistent with this policy statement.

29 U.S.S.G. § 1B1.13. The commentary to § 1B1.13 lists four circumstances that qualify as
30 “extraordinary and compelling reasons”: (A) medical condition of the defendant; (B) age
31 of the defendant; (C) family circumstances; and (D) “Other reasons—As determined by
32 the Director of the Bureau of Prisons, there exists in the defendant’s case an extraordinary
33 and compelling reason other than, or in combination with, the reasons described in
34 subdivisions (A) through (C).” U.S.S.G. § 1B1.13 n.1. The commentary also states that a

1 defendant's rehabilitation, standing alone, cannot be grounds for a sentence reduction
2 under § 3582(c). U.S.S.G. § 1B1.13 n.3.

3 The Sentencing Guideline provisions were not amended after the enactment of the
4 First Step Act and apply only to a motion for sentence reduction by the Director of the
5 Board of Prisons. This Court takes these sentencing guideline provisions into account in
6 determining whether a reduction is consistent with applicable policy statements issued by
7 the Sentencing Commission. However, the Court finds that these provisions are not a
8 limitation upon the Court's ability to determine whether a defendant has presented
9 extraordinary and compelling reasons for a sentence reduction under 18 U.S.C. §
10 3582(c)(1)(A).

11 **Ruling of the Court**

12 As a part of the First Step Act of 2018, Congress limited the consecutive stacking
13 previously required for violations of § 924(c). 18 U.S.C. § 924(c)(1)(A) provides in
14 relevant part,

15 Except to the extent that a greater minimum sentence is otherwise provided
16 by this subsection or by any other provision of law, any person who, during
17 and in relation to any crime of violence or drug trafficking crime (including a
18 crime of violence or drug trafficking crime that provides for an enhanced
19 punishment if committed by the use of a deadly or dangerous weapon or
20 device) for which the person may be prosecuted in a court of the United States,
21 uses or carries a firearm, or who, in furtherance of any such crime, possesses
22 a firearm, shall, in addition to the punishment provided for such crime of
23 violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

24 18 U.S.C. § 924(c)(1)(A)(i). Before the First Step Act, an additional § 924(c) count
25 required the district court to impose a consecutive twenty-five years in prison, even in cases
26 in which the gun possession occurred during the same course of conduct as the original
27 count. 18 U.S.C. § 924(c)(1)(C)(i) (2012). The First Step Act limited the application of
28 the enhanced penalty, providing that the higher penalty for a second or subsequent count

1 of conviction under section 924(c) is triggered only “after a prior conviction under this
2 subsection has become final.” 18 U.S.C. § 924(c)(1)(C) (2018).

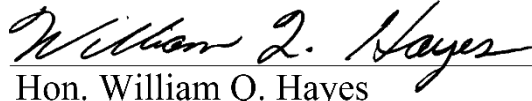
3 In this case, the record demonstrates that the Defendant’s conviction for the first §
4 924(c) offense in 94cr362 was final at the time he was sentenced on this case. Defendant
5 entered a plea of guilty in 94cr362 in the Central District of California to armed bank
6 robbery and conspiracy to commit armed bank robbery in violation of 18 U.S.C. §§ 371
7 and 2113(a) and (d). Defendant was subsequently convicted by jury of use of a firearm
8 during and relation to a crime of violence in violation of 18 U.S.C. § 924(c). Judgment in
9 94cr362 was entered on September 6, 1994 imposing a sentence of 70 months on Count 1
10 Conspiracy to Commit Armed Bank Robbery in violation of 18 U.S.C. § 2113(a) and (b);
11 and 60 months on Count 3 using a firearm during a crime of violence in violation of 18
12 U.S.C. § 924(c) to be served consecutively with Count 1. Defendant filed an appeal and
13 the Court of Appeals affirmed the conviction and sentence on May 19, 1995. *United States*
14 *v. Sehorn*, 56 F.3d 75 (9th Cir. 1995).

15 On July 31, 1996, the Court entered judgment in this case imposing a sentence of
16 240 months on 18 U.S.C. § 924(c) in Count 2 consecutive to 161 months on 18 U.S.C.
17 §1915(a) on Count 1. At the time of sentencing in this case, the judgment on Defendant’s
18 first § 924(c) conviction in 94cr362 was final. The Court concluded that the mandatory
19 consecutive sentence of 240 months on Count 2 was statutorily mandated by 18 U.S.C. §
20 924(c)(1) because “there has been a previous conviction of a 924(c).” ECF No. 723-1 at
21 47. The amendment to §924(c)(1)(C) in the First Step Act providing that the higher penalty
22 for a second or subsequent count of conviction under section 924(c) is triggered only “after
23 a prior conviction under this subsection has become final” does not have an effect on this
24 Defendant’s sentence. Because Defendant had a prior conviction under this subsection that
25 had become final, 18 U.S.C. §924(c)(1)(C) (2018) would continue to require the mandatory
26 consecutive sentence of 240 months on Count 2 as applied in this case. The Court finds
27 that the amendments to the First Step Act do not provide extraordinary and compelling
28 reasons under § 3582(c)(1)(A) to reduce this Defendant’s sentence. The Court finds that

1 there are no extraordinary and compelling reasons under § 3582(c)(1)(A) to reduce this
2 Defendant's sentence.

3 IT IS HEREBY ORDERED that the motion for modification of sentence under 18
4 U.S.C. § 3582(c)(1) (ECF No. 707) is denied.

5 Dated: June 8, 2020

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7 Hon. William Q. Hayes
8 United States District Court
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